

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROSARIO TINA and
 JESUS G. TINA,

Plaintiffs,

vs.

COUNTRYWIDE HOME LOANS, INC.,
 AMERICA'S WHOLESALE LENDER,
 RECONTRUST COMPANY,

Defendants.

CASE NO. 08 CV 1233 JM (NLS)

**ORDER GRANTING IN PART
 AND DENYING IN PART
 DEFENDANTS' MOTION TO
 DISMISS**

(Doc. No. 13)

Plaintiffs Rosario Tina and Jesus G. Tina, proceeding pro se, filed this action on July 10, 2008 against mortgage lender Countrywide Home Loans, Inc. ("Countrywide"), which does business as America's Wholesale Lender, and Countrywide's trustee for foreclosure servicing, ReconTrust Company ("ReconTrust"). Concurrently, Plaintiffs filed an *ex parte* application for a temporary restraining order ("TRO") and preliminary injunction to stay the foreclosure of their property scheduled for July 11, 2008. The court denied the TRO request on August 5, 2008. Defendants now move to dismiss the complaint under Fed. R. Civ. Pro. 12(b)(6), and, in the alternative, for a more definite statement under Rule 12(e). Doc. No. 13. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth below, the court hereby **GRANTS** the motion to dismiss in part and **DENIES** the motion to dismiss in part. The court also

1 **GRANTS** the motion for a more definite statement.

2
3 **I. BACKGROUND**

4 According to the complaint, Plaintiffs owned property located at 1720 East Fourth Street in
5 National City, California. Compl. at ¶ 5. In August 2006, Plaintiffs obtained a loan from
6 Countrywide to refinance the property. Compl. at ¶ 5. Plaintiffs do not allege facts regarding the loan
7 broker involved with helping them obtain the loan. When Plaintiffs “fell behind” on their loan
8 payments, Defendants instituted a non-judicial foreclosure and trustee’s sale. Compl. at ¶ 24. The
9 foreclosure sale occurred on July 11, 2008. Mot. to Dismiss at 3:18-19.

10 Plaintiffs assert four causes of action. In the first, they seek a declaratory judgment that, *inter*
11 *alia*, Plaintiffs deserve relief under the Fair Debt Collection Practices Act (15 U.S.C. § 1692 *et seq.*,
12 “FDCPA”), Cal. Fin. Code §§ 33560 and 22340, and Cal. Bus. and Prof. Code § 17203. In the second,
13 they seek injunctive relief pursuant to Cal. Bus. and Prof. Code § 17203, predicated in part on alleged
14 violations of Cal. Civ. Code § 2924. Third, they seek accounting relief to establish the amount of
15 money Plaintiffs owe Defendants. Fourth, they request relief for “deceptive fraud and unfair business
16 trade practices and other statutory relief.” Construed along with the other causes of action, the fourth
17 appears to allege violations of the following: (1) breach of fiduciary duty and breach of the covenant
18 of good faith and fair dealing; (2) the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.*; (3)
19 the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601, *et seq.*; (4) the Home
20 Ownership and Equity Protection Act of 1994 (“HOEPA”), 15 U.S.C. § 1602, *et seq.*; (5) the FDCPA;
21 (6) California’s Rosenthal Act, Cal. Civ. Code § 1788 *et seq.*; (7) Cal. Civ. Code § 1632; (8) Cal. Civ.
22 Code § 2924; and (9) California’s Unfair Competition Law, Cal. Bus. and Prof. Code § 17200 *et seq.*

23
24 **II. DISCUSSION**

25 **A. Legal Standards**

26 Rule 12(b)(6) dismissal is proper only in “extraordinary” cases. United States v. Redwood
27 City, 640 F.2d 963, 966 (9th Cir. 1981). In evaluating a 12(b)(6) motion, the court must accept the
28 complaint’s allegations as true and construe them in the light most favorable to Plaintiff. See, e.g.,

1 Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). The
 2 complaint's "factual allegations must be enough to raise a right to relief above the speculative level
 3" Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007) (allegations must provide
 4 "plausible grounds to infer" that plaintiff is entitled to relief). The court should grant 12(b)(6) relief
 5 only where the complaint lacks either a "cognizable legal theory" or facts sufficient to support a
 6 cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In
 7 testing the complaint's legal adequacy, the court may consider material properly submitted as part of
 8 the complaint or subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007).
 9 Furthermore, under the "incorporation by reference" doctrine, the court may consider documents
 10 "whose contents are alleged in a complaint and whose authenticity no party questions, but which are
 11 not physically attached to the [plaintiff's] pleading." Janas v. McCracken (In re Silicon Graphics Inc.
 12 Sec. Litig.), 183 F.3d 970, 986 (9th Cir. 1999) (internal quotation marks omitted).¹

14 **B. First Cause of Action – Declaratory Relief (against all Defendants)**

15 Defendant moves to dismiss Plaintiffs' claim for declaratory relief on the grounds that: 1) the
 16 resolution of the Plaintiffs' substantive claims will render declaratory relief moot; and 2) no "actual
 17 controversy" exists on which declaratory relief may be granted. Mot. to Dismiss at 6:12-14. Notably,
 18 Plaintiffs' Opposition failed to address any of Defendants' arguments with respect to the First Cause
 19 of Action. While an actual controversy still exists between the parties, as evidenced by Plaintiffs'
 20 claims beyond an injunction of the foreclosure sale, Defendant's first point has merit.

21 Declaratory judgments generally serve to resolve uncertainty faced by potential defendants
 22 who face threats of litigation and who may accrue legal liability while waiting for potential plaintiffs
 23 to initiate a suit. See Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc., 655
 24 F.2d 938 (9th Cir. 1981). The decision whether or not to hear a declaratory judgment action is left to
 25 the discretion of the federal court. See Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 533 (9th
 26 Cir. 2008). Thus, the federal court may decline to address a claim for declaratory relief "[w]here the
 27 substantive suit would resolve the issues raised by the declaratory judgment action, ... because the

¹To this end, the court may consider the Note and Deed of Trust provided by Defendants. Req. for Judicial Notice in Supp. of Mot. to Dismiss, Exs. A and B.

controversy has ‘ripened’ and the uncertainty and anticipation of litigation are alleviated.” Tempco Elec. Heater Corp. v. Omega Eng’g, Inc., 819 F.2d 746, 749 (7th Cir. 1987).

Defendants do recite separate claims under the FDCPA (Fourth Cause of Action) and § 17203 (Second and Fourth Causes of Action) and these issues are therefore addressed below. See Sections E, 5 and E, 9, *infra*. The court notes neither Cal. Fin. Code § 33560(c), a definitional section regarding securities transactions, nor Cal. Fin. Code § 22340, dealing with sales of promissory notes by licensees to institutional investors, are addressed in Plaintiffs’ substantive claims. However, even if they were so addressed, neither statute is applicable to the present case.

Since the statutes cited by Plaintiffs are either addressed in substantive sections below or provide Plaintiffs no adequate legal basis for relief, the court grants Defendants’ motion to dismiss. The first cause of action is dismissed with prejudice.

C. Second Cause of Action – Injunctive Relief (against all Defendants)

As in their TRO application, Plaintiffs ask the court to enjoin the foreclosure sale of their property. Under the same analysis presented in the court’s denial of that application (Doc. No. 12), this request is denied as moot as the foreclosure sale took place on July 11, 2008. Doc. No. 7 (Tapia Decl.), ¶¶ 2-6. Plaintiffs’ also request the court to prospectively enjoin Defendants from their allegedly deceptive trade practices under § 17203. Compl. 10:7-26. Analysis of Plaintiffs’ § 17203 claim is predicated in part by analysis of their other substantive allegations; therefore, the § 17203 request is addressed in Section E, 9, *infra*.

The court grants Defendants’ motion to dismiss as to Plaintiff’s request for injunctive relief as to the foreclosure sale of Plaintiffs’ property.

D. Third Cause of Action – Accounting Relief (against Countrywide)

Plaintiffs request an accounting because they suggest “a controversy exists as to the amount of money...actually owed by Plaintiffs to Defendants.” Compl. ¶ 43. Defendants argue an accounting is inappropriate because: 1) Defendants have no fiduciary relationship with Plaintiffs; and 2) Plaintiffs have not alleged the accounts are overly complex. Mot. to Dismiss at 9:15-17. Contrary to Defendants’ suggestion, these are not the only bases upon which an accounting may be ordered. See

1 Union Bank v. Superior Court, 31 Cal.App.4th 573, 593 (1995)(showing of fraud may support a
 2 request for accounting); 5 Witkin, Cal. Proc. 5th (2008) Pleading § 820 (claim for accounting may
 3 plead “other circumstances appropriate to the remedy”). However, the cause of action here appears
 4 to be moot as the property was sold at foreclosure, terminating the mortgage agreement between the
 5 parties. “Before an accounting is in order, the right to an accounting must be established. It may be
 6 dispensed with where under the evidence the need or right to one is not shown.” Baxter v. Krieger,
 7 157 Cal.App.2d 730, 732 (1958). “A suit for an accounting will not lie where it appears from the
 8 complaint that none is necessary or that there is an adequate remedy at law.” St. James Church of
 9 Christ Holiness v. Superior Court, 135 Cal.App.2d 352, 359 (1955). As Defendants have not counter-
 10 claimed for any deficit following the foreclosure sale, Plaintiffs owe nothing on the mortgage.
 11 Plaintiffs substantive claims address the same issues and would provide adequate remedies under the
 12 present circumstances. Therefore, no accounting is warranted.

13 The court grants Defendants’ motion to dismiss with prejudice as to the third cause of action.
 14

15 **E. Fourth Cause of Action – Deceptive Fraud and Unfair Business Trade**
 16 **Practices and Other Statutory Relief**

17 As discussed above, although not expressly mentioned under Plaintiffs’ fourth cause of action,
 18 the court construes Plaintiffs’ complaint to assert the following: (1) breach of fiduciary duty and
 19 breach of the covenant of good faith and fair dealing; (2) violations of TILA; (3) violations of RESPA;
 20 (4) violations of HOEPA; (5) violations of the FDCPA; (6) violations of the California’s Rosenthal
 21 Act; (7) violations of Cal. Civ. Code § 1632; (8) violations of Cal. Civ. Code § 2924; and (9)
 22 violations of Cal. Bus. and Prof. Code § 17203.

23 Plaintiffs filed an opposition addressing only, and to a limited extent, Defendants’ arguments
 24 on the TILA, RESPA, Cal. Civ. Code § 1632, and Cal. Fin. Code § 2924 claims. Doc. No. 17.
 25 Otherwise, Plaintiffs provided no opposition to Defendants’ arguments. The Ninth Circuit has held
 26 a district court may properly grant a motion to dismiss as unopposed pursuant to a local rule where
 27 the local rule permits, but does not require, the granting of a motion for failure to respond. See
 28 generally, Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Local Civil Rule 7.1(f)(3)(c) provides
 that “[i]f an opposing party fails to file papers in the manner required by Local Rule 7.1(e)(2), that

1 failure may constitute a consent to the granting of that motion or other ruling by the court.”

2 Nevertheless, the court addresses the merits of each basis of the complaint below.

3
4 **1. Breach of Fiduciary Duty and Breach of the Covenant of Good Faith
and Fair Dealing (against Countrywide)**

5 Plaintiffs first argue Countrywide breached a fiduciary duty owed to them. Compl. ¶¶ 47-49.
6 However, Defendant Countrywide, as the mortgage lender, has no fiduciary duty to Plaintiffs. “A debt
7 is not a trust and there is not a fiduciary relation between debtor and creditor as such.” Downey v.
8 Humphreys, 102 Cal.App.2d 323, 332 (1951). The same principle applies “to the relationship between
9 a bank and its loan customers.” Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476 (1989).
10 Plaintiffs fail to allege any special circumstances that could override this principle. See Connor v.
11 Great Western Sav. & Loan Assoc., 69 Cal.2d 850, 864 (1968). Without a fiduciary relationship, there
12 can be no breach of fiduciary duty. Plaintiffs’ claim for breach of fiduciary duty is dismissed with
13 prejudice.

14 Plaintiffs also contend Countrywide breached the covenant of good faith and fair dealing by
15 proceeding with the foreclosure sale without producing “documents which demonstrate their status
16 and lawful rights” to do so. Compl. ¶ 50. While no such action against a bank lender arises under tort
17 law, the covenant of good faith and fair dealing does arise between parties to a contract. See Price v.
18 Wells Fargo Bank, 213 Cal.App.3d 465, 478 (1989); Rest.2d Contracts § 205 (“Every contract
19 imposes upon each party a duty of good faith and fair dealing in its performance and its
20 enforcement.”). Defendants have conceded they are assignees of the lending contract; they therefore
21 may be bound by an implied duty. Mot. to Dismiss at 3:17. That said, the implied covenant “does
22 not impose any affirmative duty of moderation in the enforcement of legal rights.” Price, 213
23 Cal.App.3d at 479. Plaintiffs’ particular factual contentions regarding lack of documentation (see
24 Section E, 8, *infra*) fail to support their claim or adequately address the required elements of the claim.
25 Plaintiffs’ claim is therefore dismissed without prejudice.

26
27 **2. Violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq.**
28 **(against Countrywide)**

Plaintiffs allege Defendants violated TILA by failing to make required disclosures as to the

1 true finance charges and fees and the ownership status of the loans. Compl. ¶ 51. Plaintiffs seek
2 rescission of the mortgage loan and damages. Compl. ¶ 52-53; 15 U.S.C. § 1641(a)(1)-(2)(plaintiffs
3 may seek compensatory damages in addition to statutory damages).

4 Plaintiffs' claims relating to improper disclosures under TILA are subject to a one-year statute
5 of limitations. 15 U.S.C. § 1640(e) (any claim under this provision must be made "within one year
6 from the date of the occurrence of the violation."). Plaintiffs allege they executed the loan documents
7 "on or about August 17, 2006." Compl. ¶ 5. The instant suit was not filed until July 10, 2008. At first
8 glance, then, Plaintiffs' request for monetary damages appears to be time-barred.

9 The Ninth Circuit has held equitable tolling of civil damages claims brought under TILA may
10 be appropriate "in certain circumstances" such as when a borrower might not have had a reasonable
11 opportunity to discover the nondisclosures within the one-year period. King v. State of California,
12 784 F.2d 910, 915 (9th Cir. 1986); Nava v. VirtualBank, 2008 WL 2873406 at *3 (E.D. Cal. 2008).
13 Courts have discretion to "adjust the limitations period accordingly." Id. The applicability of
14 equitable tolling often depends on matters outside the pleadings. Supermail Cargo, Inc. v. U.S., 68
15 F.3d 1204, 1206 (9th Cir. 1995) (citing Cervantes v. City of San Diego, 5 F.3d 1273, 1276 (9th Cir.
16 1993)). Therefore, the determination "is not generally amenable to resolution on a Rule 12(b)(6)
17 motion." Id. Depending on the facts of the transaction, Plaintiffs' disclosure concerns are such that
18 they might not have been discovered within the one-year time period.

19 However, Plaintiffs have not set forth any facts alleging Defendants were involved with the
20 initial disclosures about which they complain. Plaintiffs' complaint notably avoids mentioning the
21 mortgage broker with whom they worked to secure the loan. For this reason, Defendants' motion to
22 dismiss as to the damages claim is granted without prejudice.

23 For Plaintiffs' TILA claim for rescission, the applicable statute of limitations for rescission is
24 three years, typically running from the date of loan execution. See 15 U.S.C. § 1635(f). Thus,
25 Defendants argue the rescission claim fails as a matter of law because, as an assignee, Defendants are
26 only liable "if violations of TILA are apparent on the face of the loan documents." Mot. to Dismiss
27 at 13:7-8. As a first consideration, Plaintiffs right to rescission flows as against any assignee. 15
28 U.S.C. § 1641(c) ("Any consumer who has the right to rescind a transaction under section 1635...may
rescind the transaction as against any assignee of the obligation."). Second, assessment of the facial

1 sufficiency of the loan document is a question of fact inappropriate for a Rule 12(b)(6) motion to
 2 dismiss. Plaintiffs have therefore stated sufficient facts to claim rescission of the loan. Defendants'
 3 motion with respect to Plaintiffs' claim for rescission under TILA is denied. The court notes if
 4 rescission is granted, Plaintiffs may eventually be required return the loan proceeds. See 15 U.S.C.
 5 § 1635; Marcelos v. Dominguez, 2008 WL 1820683 at *4 (N.D.Cal. 2008).

6
 7 **3. Violations of the Real Estate Settlement Procedures Act,**
 8 **12 U.S.C. § 2601 *et seq.* (against Countrywide)**

9 Defendants challenge Plaintiffs' RESPA claim as time-barred and unavailable as a private right
 10 of action. Mot. to Dismiss at 14-15. Plaintiffs' allegations regarding higher-than-promised initial
 11 interest rates, inaccurate good-faith estimate of closing costs, and unlawful collection of "yield spread
 12 fees" and "excess charges" appear to be directed toward the rules regarding initial disclosures
 13 (Sections 8 and 9). Compl. ¶¶ 21, 35, 54. To the extent Plaintiffs' claims are asserted under Sections
 14 8 or 9, they are barred by the applicable one-year statute of limitations under 12 U.S.C. § 2614 and
 15 are hereby dismissed with prejudice.

16 Plaintiffs' contentions with respect to "incorrect and improper charges, incorrect tax impound
 17 amounts, incorrect escrow amounts," and misapplication of Plaintiffs' mortgage payments appear to
 18 invoke RESPA's loan-servicing provisions (Sections 5 and 6). Compl. ¶ 22. To the extent Plaintiffs'
 19 claims are based on Section 5, 12 U.S.C. § 2604, they are dismissed without leave to amend as Section
 20 5 provides no private right of action for such violations. See Collins v. FMHA-USDA, 105 F.3d 1366
 21 (11th Cir. 1997), cert. denied, 521 U.S. 1127 (1997), reh'g denied, 521 U.S. 1145 (1997). Section 6,
 22 12 U.S.C. § 2605, does allow for a private right of action, and the applicable statute of limitations is
 23 three years. This provision requires mortgage loan servicers who receive a "qualified written request"
 24 ("QWR") for action or information from a borrower to respond and, if necessary, to act within certain
 25 periods of time. 12 U.S.C. § 2605(e)(1)-(2). Plaintiffs do mention they "attempted to request
 26 validation of the debt...but that Defendants did not respond" appropriately. Compl. ¶ 61. However,
 27 they fail to specifically allege they sent, or Defendants received, a specific, written correspondence
 28 meeting RESPA's QWR requirements. See Jones v. ABN AMRO Mortgage Group, Inc., 551
 F.Supp.2d 400, 411 (E.D.Pa. 2008). Their RESPA Section 6 claim therefore fails as a matter of law.

1 With respect to Plaintiffs' Section 6 claims, Defendants' motion to dismiss is granted without
2 prejudice.

3
4 **4. Violations of the Home Ownership and Equity Protection Act of 1994,
5 15 U.S.C. § 1602 *et seq.* (against Countrywide)**

6 Plaintiffs allege Defendants' shortcomings in disclosures and loan servicing also amounted
7 to violations of HOEPA. Compl. ¶ 57. The HOEPA provisions only apply to mortgages "secured by
8 the consumer's principal dwelling...if:

9 (A) the annual percentage rate at consummation of the transaction will exceed by more
10 than 10 percentage points the yield on Treasury securities having comparable periods
11 of maturity...; or (b) the total points and fees payable by the consumer at or before
12 closing will exceed the greater of: (i) 8 percent of the total loan amount; or (ii) \$400.

13 15 U.S.C. § 1602(aa)(1). As Defendants correctly argue, Plaintiffs fail to allege their loan qualified
14 for HOEPA's additional protections. Mot. to Dismiss at 16. Defendants' motion to dismiss is granted
15 without prejudice.

16 **5. Violations of the Fair Debt Collection Practices Act, 15 U.S.C.
17 § 1692 *et seq.* (against Countrywide)**

18 Under the FDCPA, "a debt collector may not use unfair or unconscionable means to collect
19 or attempt to collect any debt." 15 U.S.C. 1692(f). Plaintiffs' only factual allegation with respect to
20 debt collection is that they "attempted to request validation...of the debt under [the FDCPA] but that
21 Defendants did not respond to their demands in such a way as to meet the requirements of the act."
22 Compl. ¶ 61. Plaintiffs also point to Countrywide's allegedly unlawful attempts to repossess the
23 property in question. Compl. ¶ 62. Defendants contend Plaintiffs fail to allege any facts showing an
24 FDCPA violation. That argument notwithstanding, Plaintiffs fail to state a claim because
25 Countrywide is not a "debt collector" as defined under the FDCPA.² Additionally, the "activity of
26 foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt within the
27 meaning of the" FDCPA. Hulse v. Ocwen Fed. Bank, FSB, 195 F.Supp.2d 1188, 1204 (D.Or. 2002).
28 Defendants' motion to dismiss is granted with prejudice.

²The federal FDCPA defines "debt collector" as one who collects consumer debts owed to another. 15 U.S.C. § 1692(a)(6)(A). Countrywide's conduct was directed to collecting its own debts.

1 **6. Violations of the Rosenthal Act, Cal. Civ. Code § 1788 *et seq.***
 2 **(against Countrywide)**

3 To support their claim under California's fair debt collection practices law, Plaintiffs rely on
 4 the same factual contentions described above, Section E(5), *supra*. In one respect, the Rosenthal Act
 5 provides broader protection than its federal counterpart, defining a "debt collector" as any person who
 6 collects a debt "on behalf of himself or herself or others." Cal. Civ. Code § 1788.2(c). However, the
 7 Rosenthal Act incorporates the majority of its substantive provisions from the FDCPA, creating
 8 similar substantive protections. See, e.g. Cal. Civ. Code § 1788.17. Therefore, although Defendant
 9 Countrywide may qualify as a debt collector under California law, Plaintiffs fail to demonstrate how
 10 the Rosenthal Act provides them greater substantive protections against their mortgage lender.
 11 Defendants' motion to dismiss is granted without prejudice.

12 **7. Violation of Cal. Civ. Code § 1632 (against all Defendants)**

13 Plaintiffs also assert they were entitled, under Cal. Civ. Code § 1632, to receive loan
 14 documents in their native Tagalog rather than in English. Compl. ¶ 13; Opp. 4:15-5:5. Even assuming
 15 Plaintiffs did negotiate with their mortgage broker in Tagalog, they fail to allege they negotiated with
 16 *Defendants'* representatives at all, much less in Tagalog. Additionally, the mortgage contract involved
 17 here is exempt from the scope of § 1632 protection. See Cal. Civ. Code § 1632(b). Finally, with
 18 respect to ReconTrust, the trustee for foreclosure servicing, Plaintiffs have alleged no factual basis to
 19 support their claim. Plaintiffs' claim under Cal. Civ. Code § 1632 is dismissed with prejudice.
 20

21 **8. Violation of Cal. Civ. Code § 2924 (against all Defendants)**

22 Plaintiffs assert Defendants lacked standing to proceed with the nonjudicial foreclosure of their
 23 home because they failed to provide the original note. Compl. ¶¶ 4, 22. Plaintiffs cite to a non-
 24 binding opinion from an Ohio federal court, In re Foreclosure Cases (Deutsche Bank Nat'l Trust Co.
 25 v. Moore), Case No. 1:07CV2282 (N.D. Ohio Oct. 31, 2007).³ However, the referenced case is
 26

27 ³The court takes judicial notice of the referenced opinion, as requested by Defendants. Request
 28 for Judicial Notice in Support of Reply (Doc. No. 20). The court declines as moot Plaintiffs' request
 to take judicial notice of related news articles regarding the same case and notes Defendants' objection
 to the request. Request for Judicial Notice in Support of Opposition (Doc. No. 17-1); Objection to
 Plaintiffs' Request for Judicial Notice (Doc. No. 19).

distinguishable as it dealt with judicial foreclosure proceedings brought by lenders, in contrast to the present situation. Plaintiffs fail to convince the court why the holding is applicable here.

“In a nonjudicial foreclosure, also known as a ‘trustee’s sale,’ the trustee exercises the power of sale given by the deed of trust.” Nguyen v. Calhoun, 105 Cal.App.4th 428, 440 (2003). “If the trustee’s deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly.” Id. at 441. Cal. Civ. Code § 2924 outlines the requirements for nonjudicial foreclosures in California, and does not include providing the original note prior to the sale. Additionally, under California law, an “allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid.” Neal v. Juarez, 2007 WL 2140640 (S.D.Cal. July 23, 2007)(citing R.G. Hamilton Corp. v. Corum, 218 Cal. 92, 97 (1933) and California Trust Co. v. Smead Inv. Co., 6 Cal.App.2d 432, 435 (1935). Plaintiffs’ claim under this statute is therefore dismissed without prejudice.

9. Violations of California’s Unfair Competition Law, Cal. Bus. and Prof. Code § 17200 *et seq.* (against all Defendants)

Plaintiffs assert Defendants violated California’s Unfair Competition Law. Compl. 10:16-17. In particular, Plaintiffs contend Defendants’ conduct included “improperly raising Plaintiffs’ interest rates..., violating the requirements of [Cal. Civ. Code] § 2924 relating to non-judicial Trustee’s foreclosure sales, stating an incorrect amount due and owing in the notice of default,” incorrectly assessing tax and escrow impound amounts, and misapplying Plaintiffs’ payments. Compl. 10:16-21. The court finds these allegations implicate conduct of both Countrywide and ReconTrust, notwithstanding Defendants’ argument to the contrary. Mot. to Dismiss at 5:12-13.

Defendants argue Plaintiffs lack standing to bring a claim under § 17203 because they “have not adequately alleged that they lost money or property” as a result of Defendants’ conduct. Mot. to Dismiss, 10:27-28. The court disagrees. Not only have Plaintiffs lost their interest in the property through the foreclosure sale, but they also allege having paid “improperly raised” interest rates. Compl. 10:16-17. This showing is sufficient even under the authority cited by Defendants. See Hall v. Time, Inc., 158 Cal.App.4th 847, 854 and references cited therein.

California's unfair competition statute "prohibits any unfair competition, which means 'any unlawful, unfair or fraudulent business act or practice.'" In re Pomona Valley Med. Group, 476 F.3d 665, 674 (9th Cir. 2007)(citing Cal. Bus. and Prof. Code § 17200, et seq.). "This tripartite test is disjunctive and the plaintiff need only allege one of the three theories to properly plead a claim under § 17200." Med. Instrument Dev. Labs. v. Alcon Labs., CV 05-1138, 2005 WL 1926673 at *5 (N.D. Cal. Aug. 10, 2005). "Virtually any law—state, federal or local—can serve as a predicate for a § 17200 claim law." State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1102-3 (1996). Plaintiffs' sufficiently-pled TILA and RESPA claims, at a minimum, would satisfy the "unlawful" prong of § 17200 and therefore provide adequate factual support for the state-law claim.

The court notes that, in addition to injunctive relief, § 17203 affords restitutionary relief, and construes Plaintiffs' requests for "return of all funds received by Defendants from Plaintiffs" as a request for restitution. Compl. ¶¶ 52, 56; State Farm, 45 Cal.App.4th at 1102. An award of restitution is within the court's discretion. See Kraus v. Trinity Mgmt. Serv., Inc., 23 Cal.4th 116, 126-127 (Cal. 2000).

Therefore, Defendants' motion to dismiss on Plaintiffs' § 17200 claim is denied.

III. MOTION FOR A MORE DEFINITE STATEMENT

In the alternative to a favorable ruling on the motion to dismiss, Defendants ask the court to order Plaintiffs to provide a more definite statement of any remaining claims to clarify the precise factual basis on which those claims will stand. Mot. to Dismiss at 18:6-8. The claims remaining following the court's actions on the motion to dismiss are Plaintiffs' claim for rescission under TILA and for injunctive relief under Cal. Bus. and Prof. Code § 17200 et seq. Plaintiffs must provide the factual predicates, in terms of dates and transactions, they will rely on to support these claims. Plaintiffs are granted leave to amend with respect to these two claims.

IV. CONCLUSION


For the foregoing reasons, the court hereby **GRANTS** Defendants' motion to dismiss in part and **DENIES** the motion in part. The court grants Plaintiffs **45 days' leave from the date of entry**

///

1 **of this order to file a First Amended Complaint** which cures all the deficiencies noted above.
2 Plaintiffs' Amended Complaint must be complete in itself without reference to the superseded
3 pleading. Civil Local Rule 15.1.

4 **IT IS SO ORDERED.**

5
6 **DATED: October 30, 2008**

7 
8 **Hon. Jeffrey T. Miller**
9 **United States District Judge**

10 cc: All parties
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